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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JASON MORRIS, Defendant and Appellant.	C060494 (Super. Ct. No. 07F03668)

A jury found defendant Jason Morris guilty of committing an act of sexual intercourse with S.H., a child under the age of 10 (Pen. Code, § 288.7, subd. (a)) and four counts of committing lewd and lascivious acts on a child under the age of 14 (*id.*, § 288, subd. (a)). The trial court sentenced him to state prison for an indeterminate term of 25 years to life, followed by a determinate term of 10 years.

Defendant appeals, claiming the trial court's admission of evidence of past uncharged sex crimes pursuant to Evidence Code section 1108[1] was not probative, and was cumulative, confusing,

[1] Undesignated statutory references are to the Evidence Code.

unduly prejudicial, and a violation of his right to a fair trial. We disagree and shall affirm the judgment.

FACTUAL BACKGROUND

Current offense: S.H.

On February 16, 2007, defendant and his wife Bridgett, who have three daughters, babysat six year-old S.H. and S.H.'s two brothers at their home in Sacramento. Sometime that afternoon, Bridgett left with several of the children to run errands, leaving defendant alone with S.H. and their youngest daughter N.M.

While N.M. was in the living room, defendant asked S.H. if she "want[ed] a massage." He took S.H. into his bedroom, closed the door, and told her to "[s]it on the bed." In the bedroom, defendant instructed S.H. to "lay on [her] stomach." He massaged her back, told her to pull down her pants, and rubbed her butt. Defendant "pulled down his pants" and "touched his private with [S.H.'s] private." He then put his penis approximately one inch into her vagina. "[G]ooey stuff" came out from defendant's penis and onto the bed.

After ejaculating on the bed, defendant told S.H., "Don't tell anybody." He tickled S.H.'s armpits, chest and stomach, before allowing her to leave the room.

Defense

Defendant did not testify. According to defendant's pretrial statement to investigators, after his wife left the house, S.H. and N.M. went into his bedroom and asked for

backrubs. Both girls left the bedroom after defendant gave them backrubs, but S.H. returned and asked for another. Defendant claimed that as he started rubbing her back, S.H. rolled over and asked him to rub her stomach. S.H. then took off her pants and told him that "it would feel good" if he rubbed her "down there." Defendant started rubbing the inside of S.H.'s thighs before getting on his knees and pulling his penis out. Although defendant admitted he "touched the top" of S.H.'s vagina with his penis, he denied penetration. Instead, he "realized that what [he was] doing was wrong" and went into the bathroom to masturbate.

Prior uncharged acts: R.M.

R.M., who is eight years younger than defendant, is defendant's sister. As a child, she lived with defendant and six other siblings.

R.M. testified that when she was four years old, defendant took her to a crawlspace underneath their house. He laid out a blanket, told her to take her panties off, and placed his penis in her vagina. Afterward, defendant warned her "not to tell."

Two years later, when R.M. was six years old, defendant took her into his bedroom and told her to turn around. After telling R.M. to "not tell [her] parents," defendant inserted his penis into her anus. While she did not remember the exact details of what happened, she was "[o]ne hundred percent" certain that defendant had inserted his penis into her anus.

DISCUSSION

Prior to trial, defendant moved to exclude R.M.'s testimony regarding the uncharged offenses. The trial court denied the motion, ruling that the testimony was admissible as propensity evidence under section 1108 and not unduly prejudicial under section 352. Defendant contends this ruling constituted an abuse of discretion.

I. Applicable Principles

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).) Before admitting propensity evidence of a prior sex offense, the court "must engage in a careful weighing process under section 352." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*).) Under section 352, relevant evidence may be excluded where "'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Falsetta*, *supra*, 21 Cal.4th at p. 916, quoting § 352, italics omitted.) Thus, before admitting propensity evidence of a prior sex offense, the trial court must thoroughly weigh factors such as relevance, similarity to the charged offense, the certainty of commission, remoteness, and the likelihood of distracting or inflaming the jury. (*Falsetta*, at p. 917.)

On appeal, section 352 determinations are reviewed for abuse of discretion. (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.) Since the trial court "'is in the best position to evaluate the evidence'" (*id.* at p. 918), its "discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124).

With these principles in mind, we turn to defendant's claims of discretionary abuse.

II. Cumulativeness

Defendant contends that R.M.'s testimony was "needlessly cumulative" and bore on issues that were not "reasonably subject to dispute" because he admitted all elements of the charged offenses, except vaginal penetration, and penetration was the "very specific fact question the jury had to decide."

The argument is unpersuasive. It was *because* the element of penetration was in dispute that R.M.'s testimony was *not* cumulative. Defendant admitted sexually molesting his victim but denied penetration. Evidence that he *achieved* penetration with another child victim on two prior occasions tended to seriously undermine defendant's claim. The uncharged misconduct was therefore precisely the sort of "predisposition" evidence the Legislature had in mind when it enacted section 1108. (See *Falsetta*, *supra*, 21 Cal.4th at p. 915.)

III. Dissimilarity

Defendant claims that R.M.'s testimony was "not probative of whether penetration occurred" because "the alleged penetration of [S.H.] is nothing like the intercourse and sodomy that [R.M.] testified about." We disagree.

While the offenses committed against R.M. are slightly distinguishable in that they involved some degree of coercion, there were striking similarities between the offenses against R.M. and the charged crimes. Both cases involved a sexual assault of a female family member--R.M. is defendant's sister and S.H. is his wife's second cousin. Second, the victim in each case was very young: Defendant committed his sexual assaults on R.M. when she was four and six years old, respectively; the victim in this case was six. Third, in each case, defendant penetrated the victim with his penis. Finally, in each instance, defendant warned the victim not to tell anyone what he had done.

Defendant's claim that the two cases are dissimilar because "sodomy is generally regarded as more reprehensible than intercourse" is unfounded. Defendant does not support this assertion with citation of any statutory or case authority. Furthermore, contrary to defendant's argument, the Penal Code makes no distinction between the two crimes in terms of seriousness: The perpetration of *either* act by an adult on a child 10 years of age or younger is punishable as a felony under Penal Code section 288.7, subdivision (a).

IV. Remoteness

Citing to the fact that the uncharged offenses occurred 17 and 20 years ago, defendant contends they were too remote to be probative. We disagree.

"No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) In fact, "substantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses." (*Id.* at p. 285; see, e.g. *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [no abuse of discretion in admitting uncharged offenses occurring 21 to 28 years earlier in light of similarities to current charges] and *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [23-year-old rape conviction properly admitted due to substantial similarities between the victims].)

While we agree that 17 to 20 years is a significant passage of time, the trial court could reasonably have found that the similarities between the charged and uncharged acts were so remarkable as to counterbalance the remoteness factor. (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.)

V. Risk of Confusion

Defendant argues that the admission of R.M.'s testimony created a substantial risk of confusion because the jury might be tempted to punish him for the prior uncharged offenses. The court in *People v. Frazier* (2001) 89 Cal.App.4th 30, 42 (*Frazier*) acknowledged that there may be a risk of confusion

where "the uncharged offense[] . . . [is] much more serious than the charged offense." However, as we have discussed, the evidence of the uncharged acts toward R.M. was neither more serious nor inflammatory then the facts surrounding the charged offense.

In any event, the risk was mitigated by the jury instructions on reasonable doubt and the necessity of proof as to all elements of the charged offenses. Moreover, the trial court twice gave a limiting instruction, cautioning the jury that it could only consider R.M.'s testimony as propensity evidence "if the People . . . proved beyond a reasonable doubt that [defendant], in fact, committed the uncharged offenses." (See CALCRIM No. 1191.) In light of these strict limiting instructions, defendant's claim of confusion is not persuasive. (*Frazier*, *supra*, 89 Cal.App.4th at p. 42.)

VI. Constitutional Claims

Finally, defendant argues the admission of the uncharged crimes was so prejudicial that it deprived him of his federal due process rights. The contention, however, is based on the premise that the trial court abused its discretion in admitting the evidence. Since we find the evidence was properly admitted, the argument necessarily fails.

In any event, defendant is precluded from raising constitutional claims that were never tendered in the trial court. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

VII. Penal Code Section 4019

The recent amendments to Penal Code section 4019 do not entitle defendant to additional time credits, as he was committed in this case for "serious" felonies and he is "required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290)." (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50; see Pen. Code, § 1192.7, subd. (c)(6).)

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, Acting P. J.

ROBIE, J.